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Date: June 16, 2000

Case No.: 1999-LHC-1151

OWCP No.: 5-103782

In the Matter of:

CLARENCE BAGBY,
Claimant,

v.

CERES MARINE TERMINALS,
Employer.

Appearances:

Gregory E. Camden, Esq.
Amanda Kronin, Esq.
For Claimant

Robert Rapaport, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the act"), 33 U.S.C. 901 et seq. Claimant seeks temporary total disability compensation for the period from September 9, 1999 through January 31, 2000 based on a job-related neck injury sustained on April 18, 1998. At the hearing, Employer did not contest the compensability of the injury but, rather, attempted to prove that Claimant has a residual wage-earning capacity due to the availability of suitable alternative employment in the local Hampton Roads, Virginia area. A secondary issue is whether a

subsequent automobile accident and neck injury served to diminish Claimant's compensation.

A formal hearing was held in this case before me on November 16, 1999 in Newport News, Virginia, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant offered exhibits CX-1 through CX-24.[1] All were admitted except CX 23 and CX 24, which Claimant withdrew. CX 25, a post-hearing deposition of Dr. Isabelle Richmond, was with permission submitted after the hearing and, without objection, is received into evidence. Also at the hearing, Employer proffered exhibits EX-1 through EX-12, all of which were admitted into evidence. EX 13, the deposition of Dr. Foer, was with my permission submitted after the hearing, and, without objection is also received into evidence.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Whether Claimant is entitled to temporary total disability compensation for the period September 9, 1999 through January 31, 2000.

2. Whether there was suitable alternative employment which Claimant could have performed if he diligently tried.

3. Whether Claimant's subsequent automobile accident diminishes his right to compensation for his job-related injury.

STIPULATIONS

[1] The following abbreviations will be used as citations to the record:
CX - Claimant's Exhibits;
EX - Employer's Exhibits;
Tr. - Transcript of the hearing; and
JX - Joint Exhibits.

Employer and Claimant have stipulated and I find the following:

1. An employer/employee relationship existed at all relevant times;
2. The parties are subject to the jurisdiction of the act;
3. On April 18, 1998, Claimant suffered an injury to his neck arising out of and in the course of employment;
4. Claimant gave a timely notice of injury;
5. Claimant filed a timely claim for compensation;
6. Employer filed a timely first report of injury and a timely notice of controversion with the U.S. Department of Labor;
7. Claimant's average weekly wage was $698.13, resulting in a compensation rate of $465.42;
8. Claimant was paid benefits as documented by form LS-208 dated September 9, 1999 (EX 19);
9. Claimant has not received any temporary total disability benefits from September 9, 1999 to the present;
10. Employer has accepted Dr. Richmond as Claimant's treating physician in this matter;
11. Employer has provided Claimant with medical treatment as required by section 7 of the act;
12. Claimant is not entitled to compensation after January 31, 2000, since Employer provided Claimant with training as a toploader operator, after which he began employment earning more than his pre-injury employment;
13. If Claimant had a wage-earning capacity for the period at issue, it is $7.50 per hour.

(JX 1; supplemental stipulations; Employer's brief at 52-3; Claimant's brief at 15).

FINDINGS OF FACT

History of the Case

Claimant, Clarence Bagby, is a 34-year-old longshoreman and hustler driver. He estimated that the majority of his work is as a hustler driver (Tr. 72). He injured his neck on April 18, 1998 while he was driving a hustler (Tr. 40). Following the injury, he was treated by an orthopedic surgeon, Dr. John Wagner, and his partner, Dr. Robert Neff. On April 29, 1998, Dr. Wagner diagnosed cervical thoracic and lumbar strain and prescribed medications and physical therapy (CX 3-1). Claimant was last treated by Dr. Wagner on July 2, 1998. Because of complaints of pain, he referred Claimant to Dr. Walko, a physiatrist.

From June 22, 1998 through November 16, 1998, Claimant worked in a light-duty job in the Ceres administrative office answering phones (Tr. 45).

Claimant was referred to Dr. J. Abbott Byrd, an orthopedic surgeon specializing in treatment of the spine, in August 1998 (CX 3). On August 6, 1998, Dr. Byrd diagnosed cervical, thoracic, and lumbar strain with no evidence of radiculopathy. He recommended continued light-duty work (CX 3).

On November 25, 1998, Dr. Byrd released Claimant to return to fully duty as a hustler truck driver (CX 3-6). Dr. Byrd stated that Claimant was "capable of returning to work to drive whichever hustler is available to him" (CX 3-7). Claimant stated that he was last examined by Dr. Byrd in November 1998 (Tr. 48). After Dr. Byrd released him to full duty as a hustler driver, he returned to work on November 20, 1998 (Tr. 46). He worked as a hustler driver through March 2, 1999.

When he continued to suffer severe neck pain, Claimant was examined by his family physician, Dr. Thomas Royer, in January 1999 (Tr. 48). An MRI revealed cervical spine disc prolapse at C5-C6 and C6-C7. The MRI of the lumbar spine showed degenerative changes at L4-L5 with mild central prolapse (CX 1-2).

Dr. Royer then referred Claimant to Dr. Isabelle Richmond, a neurosurgeon, who first saw Claimant on March 2, 1999 (Tr. 49; CX 7). She kept him out of work beginning on that date through his surgery and recovery (Tr. 50). Dr. Richmond performed the surgery on March 29, 1999 - an anterior cervical discectomy, fusion, and anterior cervical stabilization (CX 7-4). The surgery helped by drastically reducing the pain (Tr. 54).

Claimant was scheduled for an independent medical evaluation to be performed by Dr. Warren Foer, a neurosurgeon. Claimant's appointment was for nine o'clock, but he

was twenty minutes late (Tr. 70). Dr. Foer was scheduled for surgery and was unable to examine him (Tr. 52-3). The appointment was rescheduled for September 20, 1999 (Tr. 53), but Claimant's compensation was stopped effective September 8, 1999 for alleged failure to cooperate with medical care.

Claimant was in an automobile accident on October 2, 1999, when the car he was driving was rear-ended. Claimant stated "I was jarred" and "it re-aggravated my injury and I was taken to the hospital by ambulance" (Tr. 56-7). The automobile accident caused him increased pain. Dr. Richmond treated him for the car accident through January 18, 2000 and would have taken him out of work had he not already been out of work (CX 25 at 22). She stated that he only required additional neck treatment because of the car accident (CX 25 at 30-1).

Claimant underwent two courses of physical therapy. Dr. Richmond relied on the functional capacity evaluations performed by the physical therapists. On August 17, 1999, she determined that Claimant could return to light-medium work (CX 7-7; CX 25 at 9, 27). On January 10, 2000, she determined that he had progressed to an ability to do medium-heavy work (CX 25 at 26).

Dr. Richmond released him to jobs on the waterfront - a groundsman who assists the toploader operator (Tr. 58) and a toploader operator and unarmed security guard (CX 25 at 17, 20). Claimant ultimately returned to work on the waterfront as a groundsman/toploader operator in January 2000 (Stipulation no. 12).

Claimant met with Ms. Laura Whitfield, a vocational counselor, on October 29, 1999 (Tr. 62). As a result of that meeting, she performed a labor market survey to locate suitable jobs within his restrictions, skills, education, and work history. On August 18, 1999, Dr. Richmond determined that Claimant could work an eight-hour day, should wear a lightweight hard hat, could work in a light/medium range, and should be able to change positions (EX 9). She sent job listings to Claimant (Tr. 62; EX 12).

Claimant first looked for work on November 9, 1999 (Tr. 69). Claimant did not apply for some of the jobs on the list, including jobs at HUD Distribution/Suffolk Temporaries, Hampton Roads Transit, Virginia Power, and Lee Staffing (Tr. 68-9). Claimant was aware of the union job of checker, which required minimal driving, yet he did not apply for such work (Tr. 74). Claimant was aware of "social security work" for various employers who are unable to find union hall workers and who then retain substitute "social security workers." Yet, Claimant did not try to find one of these jobs (Tr. 74).

Deposition Testimony of Dr. Isabelle Richmond

Dr. Isabelle Richmond, a neurosurgeon practicing in Norfolk, Virginia, first examined Claimant on March 2, 1999 for his April 18, 1998 neck injury (CX 25 at 4; CX 7-1). She diagnosed acquired post-traumatic cervical stenosis, a narrowing of the spinal canal (Id. at 6; CX 7-2). She opined that it was due to disc injuries resulting from the April 18, 1998 work accident (CX 25 at 8). On March 29, 1999, Dr. Richmond performed cervical fusion surgery (Id.). Following surgery, Dr. Richmond ordered range-of-motion exercises for the neck and shoulders, daily walking, and medication (CX 7-5). On July 8, 1999, Dr. Richmond noted that the "anterior cervical incision is well healed; neck range of motion is moderately decreased" (CX 7-6). She also noted "excellent early feeling of bony fusions and good prosthesis position. There is no evidence of instability in flexion extension" (CX 7-6). She ordered that Claimant begin a rehabilitative physical therapy program. Dr. Richmond opined that Claimant could not return to work as a hustler driver (CX 7-6).

On August 17, 1999, Dr. Richmond stated that Claimant had completed his work hardening program and functional capacity evaluation (FCE). His FCE showed that he could consistently work at a job in the light-medium range. Dr. Richmond reviewed some job descriptions and stated that Claimant could return to work as a ground man. She recommended no overtime for six months and also that he wear a light-weight hard hat. Over time, Claimant would be able to work up to a higher level of physical capacity (CX 25 at 27).

On October 2, 1999, Claimant was involved in a car accident and injured his neck (CX 7-11). As a result, he suffered renewed pain (CX 25 at 14). Following the accident, Dr. Richmond changed Claimant's medicine. Had Claimant been working at that time, she would have taken him out of work for a few weeks (CX 25 at 22).

When Dr. Richmond examined Claimant November 23, 1999, she noted that his neck pain from the car accident was improving (CX 25, exhibit 1). She recommended a short course of physical therapy to allow him "to return to the level he had been before the accident and [so] that we would be able to get him back to work a little faster" (CX 25 at 16). As a result, Claimant went through a course of physical therapy at Sports Therapy and Industrial Medicine from December 13, 1999 through January 2000 (CX 25 at 23, 25). A January 10, 2000 physical therapy report noted that "he had advanced in his functional tolerance and that he is in the medium-heavy PDL."

On January 18, 2000, Claimant returned to Dr. Richmond. She noted in her report that he had completed the physical therapy and was showing ability to work at the medium-

heavy PDL level. His acute post-traumatic neck pain had improved, and she determined that he had reached maximum medical improvement for his April 18, 1998 work-related injury. Dr. Richmond also determined that Claimant reached his pre-automobile accident status on January 18, 2000 (CX 25 at 18). She agreed that he could return to work as a toploader/ground man and interchange writer (Id.).

Dr. Richmond testified that Claimant could perform the job of unarmed security guard (CX 25 at 20). However, she testified that, for fear of reinjury, he still should not try to perform the job of hustler driver or any other job that involves driving a vehicle (CX 25 at 28).

Deposition Testimony of Dr. Warren Foer

Dr. Foer, a board-certified neurological surgeon practicing in Virginia Beach, Virginia, reviewed Claimant's medical records in July 1999 and examined him on September 20, 1999 for an independent medical evaluation (EX 13 at 3). Dr. Foer examined Claimant a second time after Claimant's automobile accident on January 11, 2000 (EX 13 at 9). Claimant was originally scheduled to meet with Dr. Foer on September 7, 1999 but "showed up late and I had conflicts in schedule" (EX 13 at 13). He added that "if a patient comes in late and my schedule is running such that I have surgery or something like that, I have to reschedule the patient" (EX 13 at 14).

Dr. Foer noted that Claimant had anterior cervical disc infusion surgery (EX 13 at 5-6; EX 8). Claimant had "no reactive response that individuals with spinal cord injury or compression can get when the neck is either flexed or extended" (EX 13 at 4). He stated that a person would have a tingling sensation down their neck and that Claimant did not have that kind of reaction. He found no weakness on examination. Muscle tone was normal, strength was normal, sensory examination was intact, and no asymmetric reflexes or pathological reflexes were noted (EX 13 at 4-5; EX 8). Claimant's fusion surgery had healed, he concluded (EX 8). He based this on the time elapsed, the fact that there were no medicals to show otherwise, and the fact that fusion "held up" during the car accident (EX 13 at 8, 17, 20, 22).

As of September 1999, Dr. Foer determined that Claimant was capable of returning to work. He reviewed the Sports Therapy and Medicine program and the functional capacity evaluation and compared them to his clinical findings to determine what jobs

would be appropriate for Mr. Bagby (EX 13 at 6). He also reviewed the physical activities requirements of toploader operator and approved that job on September 20, 1999 (EX 6). Dr. Foer stated that Claimant would have no problem maintaining his head and neck in a position looking upward for any length of time (EX 13 at 9). In September 1999, he determined that Claimant could not return to work as a hustler driver, stating, "he was certainly physically capable of doing that job or work, but I understood the concerns Dr. Richmond had" (EX 13 at 7). He stated that he would defer to her opinion (EX 13 at 7).

On November 10, 1999, Dr. Foer again reviewed the position of hustler driver and determined that Claimant was now capable of returning to work as such (EX 12). On deposition, Dr. Foer stated that "sufficient healing would have occurred or the fusion would have solidified and that the risk of disrupting the surgical effects I think had bypassed" (EX 13 at 8). While Dr. Foer understood Dr. Richmond's concerns about possible reinjury, he disagreed with her conclusion (Id.). This was the first accident injury of its kind that he had ever seen (EX 13 at 21). A hustler driver's physical activities do not produce any stress on the neck (Id. at 19). Dr. Foer determined that Claimant would have no problems climbing because his "strength is intact, his reflexes and sensation are intact" (Id. at 22). Further, Dr. Foer determined that the likelihood of re-injury was remote (EX 13 at 17).

Dr. Foer examined Claimant a second time on January 11, 2000 (EX 13 at 9). During that examination, Dr. Foer noted that Claimant had been involved in a motor vehicle accident and was showing increased posterior neck pain. Mr. Bagby reported that the discomfort from the car accident had been alleviated and that he had returned to his pre-injury work level. On examination, Claimant had some restriction of motion, and Claimant noted discomfort but no spasms. The neurologic examination was unremarkable, and there was an absence of pathological reflexes. Also, Claimant exhibited no hyperflexia, and sensory examination and strength were intact. Claimant underwent additional physical therapy following the car accident. Dr. Foer concluded that there was no change in Claimant's neurologic status since the September 1999 evaluation (EX 13 at 10).

On January 11, 2000, Dr. Foer reviewed three additional jobs to determine whether or not they were suitable for Claimant. He considered the functional capacity evaluation and Claimant's clinical evaluation in evaluating these jobs (EX 13 at 11). Dr. Foer approved the job of yard checker based on the job's physical activities. He stated that this job was a "very light-duty category involving walking, sitting, and standing" (EX 13 at 12).

Dr. Foer also approved the job of vessel checker based on the job's physical activities. This light-duty job involved only walking, standing, and sitting, with only visual inspections (EX 13 at 12). Finally, Dr. Foer also reviewed the job of interchange writer and

approved it, stating that there was "nothing in the job description that to me would be limiting to him," especially since the functional capacity evaluation said he could do medium to heavy work (EX 13 at 12).

Testimony of Laura Whitfield

Ms. Whitfield is a vocational rehabilitation consultant and a certified contractor for the United States Department of Labor (EX 10). As a vocational rehabilitation consultant, she has worked with people with neck injuries (Tr. 135).

Ms. Whitfield met with Claimant and evaluated his educational history and vocational history. She considered Claimant's age and transferable skills. She determined that Claimant can read and follow directions, complete a training program, and obtain a commercial driver's license. He has experience with public and customer service and is capable of learning new skills, as evidenced by the fact that he has held different positions ranging from working at Hardee's to carpentry to driving. He also knows most of the local area (Tr. 137). Mr. Bagby would like to return to work as toploader or groundsman (Tr. 136). She discussed job opportunities and located ten jobs. Claimant told her that he could "return to the position of hustler driver if he were able to drive in a vehicle that had an air ride seat" (Tr. 136).

Ms. Whitfield spoke to Dr. Byrd, Dr. Richmond, and Dr. Foer (Tr. 138). She also spoke to Claimant's physical therapist and thoroughly reviewed Claimant's medical records (Tr. 138).

Ms. Whitfield and Claimant came up with a rehabilitation plan for Claimant to return as a toploader/groundsman or hustler driver, driving hustlers with air-ride seats but not driving on the Z lot (Tr. 153). She spoke with Ceres and was advised that Claimant could be in the next training class as soon as Dr. Richmond reviewed the job description and approved it (Tr. 153).

Based on her interview of Claimant, her review of the medical records, his transferable skills, his work history, his temperament, her discussions with his physicians and health care providers, Ms. Whitfield identified eleven positions that were appropriate for Claimant in the local job market. She performed a labor market survey to identify these

jobs (EX 9; Tr. 138). She noted that he had restrictions of 1) an eight-hour work day, 2) light-weight hard hat, and 3) light-medium range work with "some positional intolerances specific to overhead lifting and visual plane" (EX 9).

Ms. Whitfield did not do educational testing because the positions in the labor market survey did not require a high-school education. Claimant could easily compete for these jobs "so I already knew that he was at that level and we didn't complete testing at that point" (Tr. 174). He can compute discount, interest, profit, loss, commission mark-up, and selling prices. His reasoning level showed that he had common sense and could carry out instructions in written, oral, or diagram form (Tr. 175). His language development based on his job skills showed that he could read safety rules, understand instructions, maintain shop tools and equipment, and follow procedures. This analysis was based on the Dictionary of Occupational Titles codes of positions he has worked (Tr. 176).

Ms. Whitfield identified eleven positions which were compatible with his transferable skills and with the restrictions provided by Dr. Richmond. For the jobs currently available at the time of the labor market survey, the wages ranged from $6.00 per hour to $17.30 per hour. She contacted prospective employers between October 15, 1999 and October 29, 1999 (EX 9 at 4).

Ms. Whitfield actually spoke with the people doing the hiring. She disclosed Claimant's complete work restrictions. They all advised her that a high school diploma was not required (Tr. 139-40). All of the employers whom Ms. Whitfield contacted stated that they would consider Claimant for the position (Tr. 145). Ms. Whitfield went to every work site except one (PENSKE). There was no impediment to Claimant's working at any of these sites (Tr. 144).

Ms. Whitfield located the following jobs:

1) Conrad's Automotive Warehouse as a delivery driver (Tr. 139; EX 9). The job was within Claimant's lifting restrictions stated on the functional capacity evaluation, and was a 40-hour week job paying $6.00 per hour. She spoke with the manager, Joe Leonard (Tr. 140-1).

2) Metro Courier as a courier driver, working 40 hours per week, earning $6.00 per hour. Mr. Jefferson, the personnel manager, stated that there were no restrictions or obstacles to Claimant's being employed at Metro Courier (Tr. 141; EX 9). If lifting was beyond Claimant's restrictions, they would provide an assistant (Tr. 170).

3) HUD Distribution/Suffolk Temporaries, paying $8.00 per hour, working forty hours per week as a yard jockey driving tractor trailers. This job is the same as a hustler driver but involves driving tractor trailers (Tr. 174; EX 9). They have air ride seating, and there is no driving over rough terrain (Tr. 174).

4) Hampton Roads Transit as a trolley driver earning $7.75 per hour, working 32 to 40 hours per week.

5) The Virginian-Pilot newspaper as a driver/service representative earning $7.00 per hour working 29 hours per week. The driver/service representative goes to businesses that sell the newspaper and picks up the day-old newspapers, replacing them with new newspapers (Tr. 144). The lifting requirement is 30 pounds, which is within Claimant's work restrictions (Tr. 145). The Virginian-Pilot representative stated that they would consider someone such as Claimant for that position (Tr. 145).

6) PENSKE Logistics as a tractor trailer driver earning $15.38 to $17.30 per hour working 40 hours per week. This job would be within the state of Virginia, and the employee is home every other day. This job does not involve loading or unloading a trailer but requires filling out forms (Tr. 146; EX 9).

7) Transforce as a driver earning $10.00 per hour, working full time 40 hours per week. Transforce provides drivers to different companies. The job involves driving a truck in the local area where the loading is done by a forklift operated by someone else. The employer stated that they would consider Claimant for this job (Tr. 147). They are very interested in hiring people who either have a CDL license or are looking to be trained (Tr. 143).

8) Lee Staffing/Crown Cork & Seal as a production machine operator earing $7.50 per hour. After 90 days, it would be raised to $8.00 per hour, working 40 hours per week. This job involves operating machines that produce aluminum cans and overseeing the flow. If there is a jam, the employee pushes a button, and a mechanic comes and repairs the machine. There is no lifting over 25 pounds and no overhead lifting (Tr. 148, 178).

9) Dollar Tree Distribution Warehouse as a forklift operator, earing $7.10 per hour, working 40 hours (Tr. 149). Items to be lifted do not weigh more than 25 pounds (Tr. 180). All objects are on pallets or in boxes (Tr. 181).

10) Dollar Tree Distribution Center as an unarmed security guard, earning $7.25 per hour, working 32-40 hours per week. The unarmed security guard notes the numbers on trucks entering and exiting the facility, pushes buttons to open the gate, walks around the facility to make sure the gates are locked, verifies loading, completes activity reports, and, if an incident occurs, calls the police (Tr. 139). The work was 30-40 hours per week, there was no overtime, and the employer would work with Claimant's restrictions (Tr. 149). The employer instructs the unarmed security guard not to confront anyone and "not to get involved in the situation, but to contact the authorities who are certified to do that" (Tr. 182).

11) Hall Auto Mall as an unarmed security guard, earning $7.00 per hour and working full time. The security guard walks around the lot or drives the company vehicle, if they prefer, to make sure that all cars are locked before the dealership closes. The employer stated that security guards are not to get involved with anyone and, if there is a disturbance, they are to call the local police. This is a 40-hour per week job with no overtime (Tr. 149; EX 9).

Ms. Whitfield contacted Dr. Byrd and Dr. Foer to approve these jobs. She also contacted Dr. Richmond and was waiting on her response. Dr. Byrd approved all of these positions, as did Dr. Foer (Tr. 151). Dr. Foer also approved the job descriptions for work at the Ceres terminal, including hustler driver, groundsman, toploader operator, slinger, and winchman (Tr. 151).

Ms. Whitfield testified that Claimant's wage-earning capacity was between $6.00 per hour and $15.38 per hour. She estimated that, if she had to choose one figure, it would be approximately $7.50 per hour since more of the positions were closer to the $6.00 per hour range (Tr. 186, 188). She stated that PENSKE Logistics' hourly rate was the highest, from $15.38 to $17.30 per hour. In her opinion, he is qualified for that job (Tr. 187).

Testimony of Charles DeMark

Mr. DeMark is a vocational counselor with Coastal Vocational Services in Portsmouth, Virginia (Tr. 191). Mr. DeMark reviewed the labor market survey performed by Laura Whitfield. He stated that Claimant should not be a security guard because there was a risk of reinjury if Claimant became involved in a fight (Tr. 201-2, 205).

Mr. DeMark did testing on Claimant and testified that the test results were "very good" (Tr. 208). Claimant reads at a 12th grade level, spells at an 11.8th grade level, and

does math at a 6.1 grade level. Because Claimant's scores were so high, Claimant would have no problem obtaining a GED (Tr. 208-9).

Mr. DeMark opined that Claimant was at a "disadvantage by not having a high school diploma" (Tr. 193). However, Claimant tested very high for a longshoreman. Also, Claimant had a certified driver's license without a high-school diploma (Tr. 206-7). DeMark has placed many individuals who did not have a high-school diploma in driving jobs (Tr. 206).

Mr. DeMark stated that, in preparing his labor market survey, he did not talk to or meet with Claimant's treating physician, Dr. Richmond (Tr. 202, 209). Neither did he speak with Dr. Foer or with Claimant's physical therapist, Andrea Powell (Tr. 209).

DeMark also stated, "it's my opinion the driving jobs would not be appropriate" (Tr. 226).

DeMark spoke to whomever answered the telephone and asked if they had information about the job in question (Tr. 211). He did not contact and speak with the same individuals that Ms. Whitfield did (Tr. 209).

DISCUSSION

1. Legal Standards

To establish entitlement to total disability benefits under the act Claimant bears the burden of establishing a prima facie case of total disability by showing that he cannot return to his usual employment due to his work-related injury. Trans-State Dredging Co. v. Benefits Review Board (Tarner), 731 F.2d 199 (4th Cir. 1984). If Claimant meets this burden, the burden shifts to Employer to show the availability of realistic job opportunities in Claimant's geographic area, which Claimant, by virtue of his "age, background,

employment history and experience, and intellectual and physical capabilities," is capable of performing and could secure if he diligently tried. Id, 731 F.2d at 201 quoting New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043 (5th Cir. 1981). Furthermore, to determine whether a job opportunity is realistic, Employer must elicit "the precise nature, terms, and actual availability" of the position. Thompson v. Lockheed Shipbuilding and Construction Co., 21 BRBS 94, 97 (1988) citing Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986), cert. denied, 107 S. Ct. 101 (1987). Finally, Employer must demonstrate the availability of a range of jobs, not just one. Lentz v. Cottman Co., 852 F.2d 129 (4th Cir. 1988).

2. Claimant Has Established His Prima Facie Case

I find that Claimant has proven that he cannot return to his usual employment due to his April 1998 injury. Dr. Isabelle Richmond, Claimant's treating physician, testified that he should not return to his preinjury job as hustler driver because of risk of reinjury (CX 23 at 18; CX 25 at 17-18). Dr. Foer, the so-called "independent" medical examiner, opined to the contrary (EX 13 at 8). However, I credit Dr. Richmond, who has significantly more familiarity with Mr. Bagby than does Dr. Foer, and who actually performed an operation on Mr. Bagby, over Dr. Foer, who saw Claimant only twice, and who had not even seen Claimant's post-surgery X-rays or his MRI when he rendered his opinion (EX 13 at 15-16). I find Dr. Richmond's prudence to be credible and persuasive and, thus, I find for Claimant on this threshold issue.

3. Suitable Alternative Employment

To meet its burden, Employer submits the labor market survey of Laura Whitfield (EX 9). In her report, Ms. Whitfield identified eleven positions which are allegedly suitable for and reasonably available to Claimant (Id.). In addition, Claimant relies on a number of positions in Ceres' own facility as suitable alternative employment.

First, Employer has established that a number of in-house jobs at Ceres were available and suitable for Claimant (e.g., see testimony of William Parker III (Tr. 109 ff.)). However, under case law, these cannot serve to defeat Mr. Bagby's claim for total

disability compensation because none of the available jobs was actually offered to Claimant (Tr. 68). Berkstresser v. Washington Metropolitan Area Transportation Authority, 16 BRBS 231, 234 (1984).

Next, Employer advances as being suitable a number of positions identified by Ms. Whitfield which involve driving vehicles. In this category are the jobs at Conrad's Automotive Warehouse, Metro Courier, Hampton Roads Transit, the Virginian-Pilot, PENSKE Logistics, Transforce, and Dollar Tree (forklift operator). I find that these jobs have not been shown to be suitable. On deposition, Dr. Richmond advised against Claimant's working in a position that required him to drive a vehicle from fear that he could seriously reinjure himself if he were involved in another vehicular accident (CX 25 at 28). As with the hustler driver position, Dr. Foer disagreed (EX 13 at 8ff). As before, I credit the testimony of Dr. Richmond over the less cautious testimony of Dr. Foer. Both are well qualified, but Dr. Richmond is Claimant's treating physician who has significantly greater familiarity with him and his condition. Perhaps she is too cautious, but I find that this has not been proven on this record. Thus, I find that none of the vehicle driving positions identified by Ms. Whitfield has been shown to be suitable.[2]

However, I find that the following positions have been shown to be suitable:

1) Unarmed security guard at Dollar Tree (EX 9 at 14; Tr. 149). This position was approved in principle by Dr. Richmond (CX 25 at 20), and Claimant's vocational expert, Mr. DeMark, did not seriously or convincingly dispute the suitability of unarmed security guard positions (Tr. 204).[3] The position was available as of October 15, 1999 and paid $7.25 per hour (EX 9 at 14).[4]

2) Unarmed security guard at Hall Auto Mall (EX 9 at 15; Tr. 149-50). As with the other security guard position, Dr. Richmond approved this position in principle (CX 25 at 20), and Mr. DeMark did not convincingly dispute its suitability (Tr. 204). The position was

[2] In addition, I note that Claimant does not have a completely clean driving record, whereas a clean record was required for the Transforce position (EX 9 at 12; Tr. 227-8).

[3] Mr. DeMark lamely argued that Claimant could reinjure himself if he got into a fight (Tr. 202). However, the employer instructs all security guards to avoid confrontations (Tr. 182), and there is no evidence that this could not be done. Apparently, Dr. Richmond did not share Mr. DeMark's concerns (CX 25 at 20).

[4] Mr. Bagby claims that, on November 11, 1999, he applied for a position at Dollar Tree but by the date of hearing (November 16, 1999) had received no reply (Tr. 66). Because he did not identify which Dollar Tree job(s) he applied for and because only five days had elapsed since his application, I find that his testimony does not adequately rebut Ms. Whitfield's evidence that the security guard job at Dollar Tree was available as of October 15, 1999 (EX 9 at 14).

available on October 29, 1999 and paid $7.00 per hour (Tr. 105; EX 9 at 14). As with the Dollar Tree security guard position, the incumbent is instructed to avoid "physical involvement" (Tr. 149).

3) Production machine operator, Lee Staffing/Crown Cork & Steel (EX 9 at 13). This position was available on July 29, 1998 and September 18, 1999 and paid $7.50 per hour. Mr. DeMark testified that, of all of the positions identified by Ms. Whitfield, this was the most suitable (Tr. 226).

Thus, I find that the three positions listed above constitute suitable alternative employment. Further, I find that they (barely) constitute a "range" of jobs within the meaning of Lentz v Cottman Co., 852 F. 2d 129 (4th Cir. 1988).

4. Wage-Earning Capacity

On brief, both parties agreed that, if Claimant had a wage-earning capacity, it was $7.50 per hour (Employer's brief at 52-3; Claimant's brief at 15). As this is consistent with the wages paid for the jobs that I have found to be suitable (e.g., see EX 9 at 13, 14, 15), I find that the parties' position is adequately documented by the evidence of record.

5. Intervening Cause

As Employer argues, Claimant's automobile accident of October 2, 1999 was unrelated to his work, and, therefore, is not compensable under the act. However, as Claimant points out (brief p.8), the automobile accident does not diminish Mr. Bagby's entitlement to disability compensation for any of the period in question because, according to Dr. Richmond, at no time during this period would he have been able to resume his duties as a hustler driver, whether or not he had had the automobile accident (CX 25 at 17-18). In order to be relieved of liability by an intervening cause, Employer must establish that the work injury played no role in Claimant's disability. Shell Offshore Inc. v. Director, OWCP, 112 F. 3d 312 (5th Cir. 1997), cert. denied 118 S. Ct. 1563 (1998); Leech v. Thompson's Dairy, 13 BRBS 231 (1981). Even Dr. Foer acknowledges that, as of a date near the time of the accident (September 20, 1999), Claimant could not return to work as a hustler driver as a result of his on-the-job injury (EX 13 at 7; CX 6 at 10, 11). Thus, with

the exception of any medical bills directly related only to the automobile accident, the automobile accident is irrelevant for purposes of Mr. Bagby's claim.

6. Diligence

Where, as here, Employer meets its burden of demonstrating the existence of suitable alternative employment, Claimant can nevertheless establish entitlement to total disability benefits if he demonstrates that he diligently tried but was unable to secure employment. Hairston v. Todd Pacific Shipyard Corp., 849 F. 2d 1194, 1196 (9th Cir. 1998); Fox v. West State Inc., 31 BRBS 118 (1997). Claimant must establish reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by Employer to be reasonably attainable and available and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1043 (5th Cir. 1981).

The record shows that Claimant did look for work beginning in early November 1999 (Tr. 63). However, he did not apply for many of the jobs on Ms. Whitfield's list, including jobs at HUD Distribution/Suffolk Temporaries, Hampton Roads Transit, Virginia Power, and Lee Staffing (Tr. 68-9).[5] Also, despite being aware of its existence, Claimant did not seek "social security work" for employers who were unable to find union hall workers (Tr. 73-4). Lastly, there is no evidence that Mr. Bagby applied for or even looked for any jobs not identified by Ms. Whitfield. Looking at the evidence of Claimant's efforts as a whole, I find that it does not add up to a showing of diligence. Indeed, Claimant's counsel does not argue on brief that Claimant demonstrated such diligence.

To conclude, because Employer has demonstrated the existence of suitable alternative employment, I find that Claimant is entitled only to temporary partial disability compensation for the period in question. However, I agree with Claimant that his entitlement is not diminished by his period of recovery from the subsequent automobile accident.

[5] I cannot fault Claimant for not applying for jobs involving driving vehicles, as I have found that they have not been proven to have been suitable. Mr. Bagby claims that he applied for work at Dollar Tree on November 11, 1999, but has not heard from them (Tr. 66). From the record, I cannot determine whether Mr. Bagby applied for the forklift operator job or the security guard job (or both) at Dollar Tree (Tr. 65). There is no evidence that he applied for the jobs at Hall Auto Mall and Lee Staffing (Tr. 69), both of which I have found to be suitable.

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary partial disability compensation at a rate of $265.42 per week for the period beginning September 9, 1999 through January 31, 2000.[6]

2. Interest at the rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

3. Employer shall continue to furnish reasonable, appropriate and necessary medical care for Claimant's work-related injury pursuant to section 7 of the act (except for care solely attributable to the automobile accident of October 2, 1999).

4. Within twenty days of the receipt of this order, Claimant's attorney shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who shall have ten days to respond with objections thereto.

5. All computations are subject to verification by the District Director.

6. Employer shall receive credit for all compensation already paid.

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/lpr
Newport News, Virginia

[6] This is based on Claimant's stipulated preinjury average weekly wage of $698.13 (Stipulation no. 7)and his post-injury average weekly wage of $300.00 ($7.50 x 40). Thus, $698.13 - $300.00 = $398.13 (post-injury wage-earning capacity). To obtain Claimant's weekly compensation rate for purposes of this order, I multiply $398.13 by 2/3, which yields $265.42.